(1) Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Janet L. Lee, Petitioner

v.

Sun Life Assurance Company
of Canada

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Rule Four (4) of the Federal Rules of Appellate Procedure violate the Fifth (5) Amendment of the United States Constitution as applied in this case?

PARTIES TO THE PROCEEDINGS

The parties in this case are Janet L. Lee, domiciliary of Louisiana, and Sun Life Assurance Company of Canada, a domiciliary of Massachusetts.

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In the Supreme Court of the United States

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Sun Life Assurance Company
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Now comes Janet L. Lee, through her Counsel of Record, and respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the district court granting summary judgment to Sun Life Assurance Company of Canada and denying summary judgment filed by Janet L. Lee is unreported. The order of the court of appeals granting the motion to dismiss the appeal under the Provisions of Rule 4 of the Federal Rules of Appellate Procedure is unreported.

JURISDICTION

The order of the court of appeals was entered on May 31, 2001. No further pleadings were filed in the court of appeal. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

Rule 4 of the Federal Rules of Appellate Procedure purports to establish an absolute cut-off period for all appeals after 180 days from entry of judgment or within 7 days after the moving party receives notice of the entry of judgment, whichever is earlier. The 180 day period applies regardless of whether the moving party ever receives notice. The Fifth Amendment of the United States Constitution prohibits deprivation of property without due process of law. Due process of law requires notice and an opportunity to be heard.

STATEMENT

1. This case involves a simple factual situation. Petitioner is aggrieved by the order dismissing her appeal by a three judge panel of the Fifth Circuit Court of Appeal. That order is based upon Rule 4 of the Federal Rules of Appellate Procedure. It was entered May 31, 2001. In district court the matter was submitted to the trial judge on May 18, 2000, with each party filing a motion for summary judgment with appropriate attachments. The trial judge took the matter under advisement. The judge issued a memorandum opinion and judgment. The judgment was entered on June 30, 2000. The judgment granted a summary judgment for Sun Life Assurance Company of Canada and denied summary judgment for Janet L. Lee. The Clerk of Court for the Middle District of Louisiana did not send notice until March 30, 2001. The parties received the notice via United States mail on April 2, 2001. Neither party was expecting a quick decision in the case as the trial judge had to read substantial medical records contained in the record of the case. The thing that probably caused the mailing of the notice was a phone call from counsel for Sun Life Assurance Company of Canada. This phone inquiry as to the status of the case was made on or about March 29, 2001. On April 3, 2001, Counsel for Janet L. Lee filed a notice of appeal. On April 18, 2001, Sun Life Assurance of Canada filed a motion to dismiss the appeal of Janet L. Lee. An opposition memorandum of law was filed by Janet L. Lee. The

court granted the motion to dismiss on May 31, 2001.

2. Original jurisdiction in the Federal District Court was invoked under divinity of citizenship on January 14, 1997, when Sun Life Assurance Company of Canada filed a removal petition. The case also had a federal question under URESA.

3. The key issue before this Honorable Court is whether the Fifth Amendment is violated when a federal rule of court provides that, after the passage of 180 days after entry of judgment, the right to appeal that judgment is lost, even when no notice of entry of judgment has been given to the party seeking to appeal?

This Honorable Court, in the case of *Cafeteria and Restaurant Workers Local 473* v. *McElroy* 367 U.S. 886, 81 S. Ct. 1743, L. Ed. 2d. 1230 (1961) stated that the very nature of due process of law negates any concept of inflexible procedures universally applicable to every imaginable situation. This court has also stated that fair play is the essence of due process. See *Galvan* v. *Press* 347 U.S. 522, 74 S. Ct. 737, 98 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954). Additionally, this Court has held that valid contracts are property whether the obligor be a private citizen, city state or United States government. See *Lynch* v. *United States* 292 U.S. 571, 54 S. Ct. 840 78 L. Ed. 1434 (1934)

The present case involves a suit on a contract for disability benefits by Janet L. Lee. In *Bloom* v. *Illinois* 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d.

522 (1968) the court held that the Fifth Amendment protects citizens from federal action which would deprive the citizen of life, liberty, or property without due process of law. It is clear that the Fifth Amendment is applicable to this instant case.

Petitioner shows that she was denied due process of law by the arbitrary application of Rule 4 of the Federal Rules of Appellate Procedure where she received no notice of entry of judgment until after the 180 days set out in the rule had already run. In the case of *Knoetze* v. *United States* 634 F.2d 207, 211 (5th Cir. 1981) the court held that the Fifth Amendment due process clause attaches whenever the federal government seeks to deny a liberty or property interest.

Petitioner is being denied a property interest by the arbitrary application of Rule 4 of Federal Rules of Appellate Procedure when she never received notice of entry of judgment prior to the running of the 180 day provision of Rule 4.

In *Projert* v. *District of Columbia* 948 F. 2d. 1327, 292 U.S. App. D.C. 219 (C.A.D.C. 1991) the court held that due process, at a minimum, requires that the government provide notice and some kind of opportunity to be heard before deprivation of property interest. The notice provided must be reasonably certain to inform those affected.

Applying that principle to this case, it is obvious that the notice from the Clerk of Court of the Middle District of Louisiana informed Counsel for Petitioner only after the running of the 180 day period set forth in Rule 4 of the Federal Rules of

Appellate Procedure. Said notice was not timely and this purports to end Petitioner's right to be heard at the appellate court.

Rule 4 is an inferior law to Amendment 5 of the United States Constitution. They are both federal laws. As applied in this specific case, Rule 4 violates Petitioner's right to notice under the Fifth Amendment due process clause. That violation results in loss of a substantial right. The right of an opportunity to be heard at a reasonable time and reasonable manner in the Fifth Circuit Court of Appeal.

In *United States* v. *James Daniel Good Real Property* 510 U.S. 43, 114 S. Ct. 492 126 L. Ed. 2d. 490 (1993) the court, where the United States seized, under a federal statute, property consisting of a house and four acres of land, without notice to the owner or an adversary hearing, held that the seizure had deprived the owner of his property without due process of law.

The case law under the Fifth Amendment due process clause is uniform that an elementary and fundamental requirement of due process of law in any proceeding which is to be given finality is notice, reasonably calculated, under all the circumstances, to apprise the interested parties of the action. See *Lambert* v. *California* 355 U.S. 225, 78 S. Ct. 210 2 L. Ed. 2d. 228 (1957) and *Potter* v. *Castle Construction Co.* 355 F. 2d. 212, 215 (5th Cir. 1966) A opportunity to be heard, also a due process right, is denied when notice is not given. Thus, the heart of due process, that is fairness, is

denied to Petitioner in the precise facts of this case. In *Kaczmarczyk* v. *I.N.S.* 933 F. 2d. 588, 596 (7th Cir. 1991) the court stated "the essence of due process is that a person in jeopardy of serious loss be given notice of the case and opportunity to meet it." The court cited *Matthews* v. *Eldridge* 424 U.S. 319, 3F8. 96 S. Ct. 893, 909 47 L. Ed. 2d. 18 (1976) as authority for the quoted language. This Court held in *West Coast Hotel Company* v. *Parrish* 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1973) that the due process clause of the Fifth Amendment is a limitation or arbitrary authority and a guarantee against all unreasonable legislation which demands that all laws not be unreasonable capricious or arbitrary.

REASONS FOR GRANTING THE PETITION

The three judge panel of the court of appeal ignored Janet L. Lee's contention that Rule 4 of the Federal Rules of Appellate Procedures, as applied in this case, denied her due process of law under the Fifth Amendment. While rules of court and statutes are presumed to be constitutional; where there is a clear conflict between a rule of court or statute with the constitution, the court should not hesitate to declare that the constitution prevails. The Fifth Circuit Court of Appeal failed to do so in this case. Janet L. Lee, under that decision, has lost her right to appeal an erroneous ruling of the trial court. The erroneous ruling deprives her of disability benefits under a contract with Sun Life

Assurance Company of Canada. Janet L. Lee should not, here in America, lose her right of appeal without having received notice of the trial court's judgment. Having not received notice, until after the 180 period after entry of judgment, authorized by Rule 4 has run, deprives Janet L. Lee of an opportunity to be heard in the court of appeals.

Therefore, Rule 4 of the Federal Rules of Appellate Procedure, as applied to this case, violates Janet L. Lees due process rights under the Fifth Amendment in two (2) specific ways. First, the rule violates the requirement of due process of law that adequate notice be given. Secondly, the rule violates Janet L. Lee's due process right to be heard at a meaningful time and in a meaningful manner. It would be constitutional if the cut-off period was a reasonable period after notice. However, here the rule is clearly in conflict with the constitutional provision. The result is an arbitrary dismissal of the right to appeal, a right favored in law. Imperfection is part of the human condition. Thus, the need for redress from error in the trial courts is a honored American right.

The court of appeal failed to address the conflict between Rule 4 and the Fifth Amendment in this case. That conflict is apparent.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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August, 2001

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JANET L. LEE	**CIVIL ACTION**
VERSUS	**NUMBER 97-32**
SUN LIFE	**JUDGE TUCKER**
INSURANCE CO.	**L. MELANCON**

NOTICE OF APPEAL

NOTICE IS HERBY GIVEN that Janet L. Lee, the Plaintiff in the above entitled and numbered cause, does hereby Appeal to the United States Court of Appeals for the Fifth Circuit, from the Trial Judge's granting of Summary Judgment on behalf of Defendant and denying Summary Judgment on behalf on Plaintiff, notice of this Judgment was first received by Plaintiff on April 2, 2001 by United States Mail, although the Judgment was rendered and signed on June 28, 2000.

Filed:
U.S. District Ct.
Middle Dist. of LA.
01 APR – 3
AM 11:24
/s/ deputy clerk

By Attorney:
/s/Leo J. Berggreen
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 01-30427

JANET L. LEE,
Plaintiff - Appellant
v.
SUN LIFE ASSURANCE CO. OF CANADA
Defendant – Appellee

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

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Before DAVIS, JONES, AND DEMOSS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of Appellee to dismiss the appeal for lack of jurisdiction is **GRANTED**.

U.S. COURT OF APPEALS
FILED
MAY 31, 2001
CHARLES R. FULBRUGE III - CLERK

U.S. CONSTITUTION
FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULES OF APPELLATE PROCEDURE

RULE FOUR

A. Appeal in a Civil Case.

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right form a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.

(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.

(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed,

or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4

measured from the entry of the order disposing of the last such motion outstanding. No additional fees well be required for filing an amended notice.
(5) The district court upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.
(6) The district court, if it finds (a) that a party entitled to notice of entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.
(7) A judgment or order is entered within the remaining of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.
b) **Appeal in a Criminal Case.** –This portion of Rule 4 is not applicable in this case.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL

APPENDIX

SUPPLEMENTAL APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JANET L. LEE	**CIVIL ACTION NO.**
VERSUS	**97-0032**
SUN LIFE	**JUDGE TUCKER**
ASSURANCE CO.	**L. MELANCON**

MEMORANDUM RULING

Before the Court are cross motions for summary judgment filed by the plaintiff and the defendant. For the following reasons, the motion for summary judgment filed by the plaintiff will be denied and the motion for summary judgment filed by the defendant will be granted.

Background

This is an action arising from the denial of benefits under an Employment Retirement Income Security Act (ERISA) plan. *29 U.S.C. §1001 et seq.* Plaintiff was employed by State National Life Insurance Company as a secretary. *(R. 35 ¶2; 41, ¶1).* In her complaint, plaintiff claims she became disabled in September 1993 as a result of cervical and lumbar surgeries[1] and seeks disability benefits

[1] Plaintiff's medical records indicate she had a posterior cervical fusion on October 16, 1990 and a lumbar spine fusion with insertion of Texas Scottish Rite Instrument on September 8, 1993. *(R. 36,no. 83).*

under an ERISA plan ("Plan") funded by a group disability insurance policy issued to her employer by Sun Life, Policy No. 27866 ("Policy). *(R.1, ¶3; R.35, ¶4; 41, ¶2).* The Policy contains the following definition:

> An Employee is totally disabled if he is in a continuous state of incapacity due to illness which:
>
> 1. while it continues throughout the Elimination Period and during the following 24 months of incapacity, prevents him from performing all of the material duties of his Regular Occupation; and
>
> 2. while it continues thereafter, prevents him from engaging in any occupation for which he is or becomes reasonably qualified by education, training or experience.

(R. 35, ¶5; 41, ¶6; Policy, pp. 5-6)

In February, 1994, Sun Life received a claim for long term disability benefits on behalf of plaintiff. *(Id. at ¶6; ¶3).* Sun Life also received a statement of plaintiff's attending physician, Charles R. Billings, M.D., medical information from the hospital where plaintiff had her fusions in

September, 1993 and a completed Rehabilitation Questionnaire from plaintiff. *(R. 35, ¶¶7-10).* Plaintiff's job description received from her employer described plaintiff's job as involving the following: standing (one hour); walking (one hour) and sitting (six hours); occasional (¼ to 2½ hours)' bending/stooping, reaching above shoulder level, kneeling, balancing, pushing/pulling, usual lifting (under 5 pounds) and maximum carrying (10 pounds). *(Id. at ¶11).* Pursuant to the provisions of the Policy, Sun Life approved plaintiff's claim and paid disability payments to plaintiff from March 7, 1994 until March 16, 1996. *(R.20, 9/21/98 Ruling granting defendant's motion for partial summary judgment; 41 ¶¶4&5).*

On November, 1995, Sun Life had a medical review of plaintiff's claim for benefits performed in which the medical reviewer found that as plaintiff's fusion had healed and was solid, she was apparently no longer totally disabled after November 1, 1994. *(R. 35, ¶¶22&23).* In a letter dated December 19, 1995, Sun Life informed plaintiff that on March 27, 1996, she would have received benefits for 24 months and beginning at that time, she would be required to provide evidence of total disability from "any occupation" under the terms of the Policy *(Id. at ¶24).* Sun Life requested and received supplemental information to support plaintiff's continuing claim of total disability as well as additional records from Dr. Billings. *(Id. at ¶¶ 13-21, 25-29; R. 41, ¶¶8&9).*

In a letter dated April 29, 1996; Sun Life advised plaintiff that it was denying her claim for long term disability benefits beyond the 24 month "own occupation" period. *(Id. at ¶30;¶7).* Plaintiff appealed the decision to deny her claim for further benefits. *(R. 35, ¶31).* Sun Life referred plaintiff's claim for an independent medical records review to George McManama, Jr., M.D. and in a letter dated July 24, 1996, Sun Life informed plaintiff of its decision to affirm its previous denial of plaintiff's claim for further total disability benefits. *(Id. at ¶¶32-34).* Plaintiff appealed Sun Life's decision reaffirming the denial of plaintiff's claim for benefits, submitted medical records from Dr. Billings and, by letter dated September 20, 1996, submitted additional x-rays to Sun Life. *(Id. at ¶36).* On November 11, 1996, Sun Life Advised plaintiff that the x-rays were not sufficient and that she needed to submit evidence to counter the independent medical record review. *(Id. at ¶37).* Plaintiff filed the instant action on January 14, 1997, in the Nineteenth Judicial District Court for East Baton Rouge Parish. On January 14, 1997, defendant filed a Notice of Removal to this Court. *(R.1).* On September 21, 1998, the Court granted Sun Life's motion for partial summary judgment finding that plaintiff's disability policy is covered by ERISA and dismissing plaintiff's state law claims under Louisiana Revised Statute 22:657, as preempted by ERISA. *(R.20)*

Summary Judgment Standard

A motion for summary judgment shall be granted if the pleadings, depositions, and affidavits submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P.56.* Once the movant produces such evidence, the burden shifts to the respondent to direct the attention of the court to evidence in the record sufficient to establish that there is a genuine issue of material fact requiring a trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The responding party may not rest on mere allegations made in the pleadings as a means of establishing a genuine issue worthy of trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). If no issue of fact is presented and if the mover is entitled to judgment as a matter of law, the court is required to render the judgment prayed for. *Id.* Before it can find that there are no genuine issues of material fact, however, the court must be satisfied that no reasonable trier of fact could have found for the non-moving party. *Id.*

Analysis

Sun Life's decision that Lee is not totally disabled as defined by the Plan is a factual determination subject to review by the court under

an abuse of discretion standard. *Meditrust Financial Services Corp. v. The Sterling Chemicals, Inc.*, 168 F.3d 211, 213 (5th Cir. 1990). In reviewing a decision for abuse of discretion, the court considers whether the decision was arbitary or capricious. *Sweatman v. Commercial Union Ins. Co.*, 39 F.3d 594, 601 (5th Cir. 1994). "When reviewing for arbitrary and capricious actions resulting in an abuse of discretion, we affirm an administrator's decision if it is supported by substantial evidence. A decision is arbitrary only if 'made without a rational connection between the known facts and the decision or between the found facts and the evidence'." *Meditrust*, 168 F.3d at 215 *quoting Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 828-29 (5th Cir. 1996). Substantial evidence is "more than a mere scintilla. It seems such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 215 (5th Cir. 1996) *quoting Richardson v. Perales*, 402 U.S. 389, 401 (1971). A federal court owes "due deference to an administrator's factual conclusions that reflect a reasonable and impartial judgment." *Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552, 1562 (5th Cir. 1991). The Court's review is limited

to administrative record before Sun Life. *Vega v. National Life Ins. Serv., Inc.*, 188 F.3d 287, 299 (5th Cir. 1990)[2]

Sun Life asserts its decision to deny plaintiff's claim for disability benefits beyond the 24-month "regular occupation" period must be upheld as a matter of law as there is compelling record evidence to support Sun Life's determination that plaintiff was capable of performing sedentary work and therefore was not totally disabled from "any occupation." *(R. 36).* Plaintiff contends that Sun Life's decision to deny her further long term disability benefits after her first 24 months of disability is contrary to the weight of medical evidence provided by her treating physician, Dr. Billings, that her impairments precluded her from returning to gainful employment, and is therefore an abuse of discretion. *(R. 42).* Plaintiff claims that Sun Life should have greater weight to the opinions of her treating physician, Dr. Billings, than it have to Sun Life's medical consultant, Dr. McManama, and also points out that Dr. McManama did not actually examine plaintiff, but

[2] Although plaintiff suggests that the Court should consider plaintiff's April 18, 2000 affidavit as well as plaintiff's contentions regarding Dr. Diodene's February, 1995 report and the Social Security Administration's decision, this evidence is not part of the administrative record.

simply reviewed her medical records.[3]

In making its decision to terminate plaintiff's disability benefits on March 27, 1996, the Sun Life relied on the medical information from plaintiff's treating physician, Dr. Billings, as well as Dr. George McManama, Jr., an orthopedic surgeon who Sun Life had retained to perform a medical records review. *(R. 36, Plaintiff's Medical Records).* In his Attending Physicians' Statement submitted with plaintiff's February, 1994 claim for long term disability benefits, Dr. Billings diagnosed plaintiff with lumbar and cervical spondylosis following fusion surgery. In his initial report to Sun Life, Dr. Billings reported that plaintiff had a Class 5 physical impairment, meaning a "severe limitation of functional capacity; incapable of minimal (sedentary) activity" and would be totally disabled for one year following the surgery. *(R. 35, Medical Record no. 230-31).* Sun Life approved plaintiff's claim for long term disability after receiving Dr. Billings Attending Physician's Statement. Sun Life requested and received additional information and reports from Dr. Billings to evaluate plaintiff's benefits claim: (1)November 1, 1994, "radiographs of the lumber spine revealed the hardware [related

[3] While plaintiff contends that Sun Life, as the plan administrator, had a conflict of interest in this matter, plaintiff merely alleges that the fiduciary is an insurance company and fails to offer any evidence that a conflict actually existed or had any impact on Sun Life's decision to terminate benefits.

to plaintiff's laminectomy and fusion] to be in place satisfactorily, with the fusion to be solid" *(Id. at n. 78);* (2) January 10, 1995, plaintiff was walking approximately two miles per day and there was no evidence to neurovascular impairment; "permanent restrictions in activities remain in effect, including no overhead work, no work with the arms extended, no heavy lifting, no repetitive bending or stooping, and no prolonged standing or sitting" *(Id. at 77);* (3) March 31, 1995, plaintiff "remains active despite her discomfort"; "permanent restrictions in activities remain in effect, including no overhead work, no work with the arms extended, no heavy lifting, no repetitive bending or stooping, and no prolonged standing or sitting" *(Id. at 76).*

After informing plaintiff that she would be required to provide evidence of total disability from " any occupation" in order to receive benefits after March 27, 1996, on February 6, 1996 Sun Life received a supplemental statement prepared by Dr. Billings on January 29, 1996 which stated that plaintiff had a Class 5 impairment and was totally disabled from her own job and "any other job." *(Id. at 62).* On March 5, 1996, March 16, 1996 and April 19,1996, Sun Life requested additional medical information from Dr. Billings, including current restrictions and limitations and objective evidence thereof. *(Id. at 54, 47, 46).* In a report on

April 22, 1996, Dr. Billings stated "[t]his patient should be considered sufficiently physically impaired to preclude return to gainful employment. Permanent restrictions in activities remain in effect, including no heavy lifting, no repetitive bending or stooping and no prolonged standing or sitting." *(Id. at 43).* Dr. Billings' supplemental report received on April 23, 1996 stated "[plaintiff] was seen again in the office on April 9, 1996, for follow up regarding cervical and lumbar spondylosis. Since the last visit, her back pain has predominated and interferes with her activities.... There has been no intervening trauma.... The repeat orthopaedic examination revealed restriction in lumbar spine range of motion. Straight leg raising of 70 degrees when alternating legs produced pain in the back radiating into the left lower extremity. Pulses were equal in both feet.... The patient should be considered sufficiently physically impaired to preclude return to gainful employment. *(Id. at 42).*

Upon reviewing plaintiff's appeal of its decision to deny her claim for long term disability benefits beyond 24-month months, Sun Life determined that further medical review was necessary to evaluate plaintiff's condition and referred plaintiff's claim for an independent medical records review to Dr. George McManama, Jr., an orthopedic surgeon. *(Id. at 14, 22-24, 26).* Dr. McManama reviewed plaintiff's medical records and on July 22, 1996 provided his findings in a report to Sun Life.

Dr. McManama determined that "[plaintiff] appears to have adequate fusion in both the cervical and lumbar spines. I could not relate her subjective complaints to any objective evidence of pseudoarthrosis on her x-rays. There is loosening of the pedicle screw at S1, but that is unrelated to any symptoms that she has at this time. She has an adequate fusion of the lumbar spine. It is my feeling that [plaintiff] is certainly not totally disabled, based upon my review of her medical records and x-rays. She appears capable of sedentary work that does not involve excessive bending and stooping. I reviewed her job description and it appears to me that she should be able to perform the duties of a secretary. It also appears that Dr. Billings feels that she similarly is only restricted from heavy lifting and repetitive bending and stooping." *(Id. at 22-24).*

Sun Life's decision that plaintiff was not totally disabled as defined by the Plan is supported by Dr. McManama's report determining that plaintiff was capable of performing sedentary work, and therefore, was not totally disabled from performing "any occupation," as well as the medical reports of Dr. Billings. As determined by Dr. Billings in his January 10, 1995 report and by Dr. McManama, the objective evidence confirmed that plaintiff's fusion was solid. Dr. McManama could not relate plaintiff's subjective complaints to any objective evidence of pseudoarthrosis on her x-rays. Further

Dr. McManama specifically reported that plaintiff was not totally disabled and that "she appears capable of sedentary work that does not involve excessive bending and stooping." While Dr. Billings continued to state in his April 22, 1996 report that plaintiff "should be considered sufficiently physically impaired to preclude return to gainful employment," the only restrictions he placed on plaintiff's activities were "no heavy lifting, no repetitive bending or stooping and no prolonged standing or sitting."

Sun Life considered all of the evidence in the administrative record. It made a permissible choice to follow the opinion of the consultant it retained, rather than Lee's treating physician. Sun Life had no duty to give the opinions of her treating physician or physicians who actually examined her greater weight. *See Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1016 (5th Cir. 1992).

The sole issue is whether Sun Life abused its discretion in denying Lee's claim. *Pierre*, 932 F.2d at 1559, 1562. The record provides that Sun Life adequately investigated Lee's condition and analyzed all of her records. When Lee submitted additional records, they were appropriately considered. The Court finds that Sun Life did not abuse it discretion by denying Lee's claim. The administrative record contains substantial evidence to show that Lee is capable of performing

some sedentary work for which she is qualified.

Conclusion

Considering the issue that is before the Court, whether the plan administrator abused its discretion in finding that Janet Lee was not totally disabled as of March 27, 1996, the record reflect that the plan administrator's determination was appropriate. According, plaintiff's motion for summary judgment will be denied and defendant's motion for summary judgment will be granted. /s/

COPY SENT
DATE 06-29-00
BY /s/ RW
TO: /s/ TLM
Clerk, USDC, MDLA (FAX)

FILED
June 28, 2000
/s/Ronald G. Weathus
Deputy Clerk, U.S. District Court
Middle District of Louisiana
Baton Rouge, La.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JANET L. LEE	**CIVIL ACTION NO.**
VERSUS	**97-0032**
SUN LIFE	**JUDGE TUCKER**
ASSURANCE CO.	**L. MELANCON**

JUDGMENT

In accordance with the Memorandum Ruling issued on this date,

IT IS ORDERED that the Motion for Summary Judgment, filed by the plaintiff [Rec. Doc. 40] is DENIED and the Motion for Summary Judgment, filed by the defendant [Rec. Doc. 34] is GRANTED, and that the judgment is entered in favor of the defendant, Sun Life Assurance Company of Canada, and against the plaintiff, Janet L. Lee.

Thus done and signed this 28th day of June, 2000 at Lafayette, Louisiana.

/s/
Tucker L. Melancon
United States District Judge
Sitting by Designation

COPY SENT
DATE 06-29-00
BY RW
TO: TLM
Clerk, USDC, MDLA
(FAX)

000260

Filed June 28, 2000
/s/ Ronald G. Weathus
Deputy Clerk
U.S. District Court
Middle District of LA.
Baton Rouge, La.

Supreme Court, U.S.
FILED
NOV

No. 01-599

In The

Supreme Court of the United States

JANET L. LEE,

Petitioner,

v.

SUN LIFE ASSURANCE COMPANY OF CANADA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petitioner is Janet L. Lee. The respondent is Sun Life Assurance Company of Canada. Sun Life Assurance Company of Canada is wholly owned by Sun Life Financial Services of Canada Inc., a publicly traded company. Mark E. Schmidtke of Hoeppner, Wagner & Evans LLP is the counsel of record for the respondent. Michael Bloom, house counsel, is co-counsel for Sun Life Assurance Company of Canada.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari. The Fifth Circuit's decision to dismiss Petitioner's untimely appeal for lack of jurisdiction under Federal Rule of Civil Procedure 77(d) and Federal Rule of Appellate Procedure 4(a)(6) is not only mandated by those rules, but is also consistent with the uniform practice of the circuit courts. For over fifty years, the federal rules of civil and appellate procedure have incorporated a deadline for filing a notice of appeal where the district court clerk fails to timely notify the parties of the court's final judgment. These rules have placed a burden on the litigants to keep informed of the trial court's proceedings. Petitioner cannot complain that she was not given an opportunity to be heard when she did not even attempt to satisfy this burden. Thus, Petitioner has not asserted a viable constitutional law issue that would merit review by this Court and there is no reason for this Court to review the decision below.

JURISDICTION

This Court has discretionary jurisdiction to review decisions by the federal courts of appeals. 28 U.S.C. § 1254(1). For the reasons set forth herein, Respondent submits that this court should not exercise this jurisdiction.

STATUTES INVOLVED

This case involves Federal Rule of Appellate Procedure 4(a)(6), Federal Rule of Civil Procedure 77(d), and the Fifth Amendment of the United States Constitution.[1]

COUNTERSTATEMENT OF THE CASE

Petitioner filed suit in state court, seeking to overturn a decision by Sun Life Assurance Company of Canada ("Sun Life") to deny Petitioner's claim for benefits under an employee disability benefit plan. Sun Life removed the matter to the United States District Court for the Middle District of Louisiana based on original jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e) because the matter involved a claim for benefits under a disability policy governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.*[2] Jurisdiction was also based on 28 U.S.C. § 1332 because the case involved citizens of different states and the matter in controversy exceeded the sum of $75,000 exclusive of interests and costs.

On April 11, 2000, Sun Life filed a motion for summary judgment. Petitioner filed a cross-motion for summary judgment. On June 28, 2000, the District Court

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[1] The text of Civil Rule 77(d), Appellate Rule 4(a)(6), and the pertinent Advisory Committee Notes are included in the Opposition Appendix ("Opp. App.") beginning at Opp. App. 1.

[2] Petitioner erroneously refers to the federal statute as "URESA."

entered Judgment denying Petitioner's motion and granting Sun Life's motion. Petitioner never checked the status of the summary judgment motions. [Petition for Writ of Certiorari, p. 3.]

Petitioner did not receive notice of the District Court's entry of Judgment until April 2, 2001. On April 3, 2001, more than 9 months after the District Court entered Judgment, Petitioner filed a notice of appeal. Sun Life filed a Motion to Dismiss the appeal as untimely under Civil Rule 77(d) and Appellate Rule 4(a)(6). Specifically, Sun Life argued that because Petitioner's notice of appeal was filed after expiration of the 180-day time period in Appellate Rule 4(a)(6), her appeal was barred. On May 31, 2001, the United States Court of Appeals for the Fifth Circuit dismissed the appeal.

REASONS FOR DENYING THE WRIT

A. Petitioner Has Failed to Offer This Court A Compelling Reason That Would Warrant Granting the Writ under Supreme Court Rule 10.

Petitioner has not established any of the bases for granting a writ as specified in Supreme Court Rule 10. Petitioner has failed to demonstrate any discord among the federal circuit courts of appeals. In fact, the circuit courts have uniformly enforced the time deadlines

incorporated in the federal rules for filing appeals.[3] Petitioner also has not established a conflict between the decision of the Fifth Circuit in this case and a prior decision of this Court. The cases cited by Petitioner addressing Fifth Amendment issues do not even come close to addressing the constitutionality of the time deadlines in the federal rules.[4] Thus, Petitioner has failed to

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[3] *See, e.g., Perfetto v. Kuhlmann*, 1998 U.S. App. Lexis 15307 (2d Cir. 1998); *Marcangelo v. Boardwalk Regency*, 47 F.3d 88 (3d Cir. 1995); *Latham v. Wells Fargo Bank*, 987 F.2d 1199 (5th Cir. 1993); *United States of America v. Personal Property Seized From D.C. Cycle Shop*, 2000 U.S. App. Lexis (6th Cir. 2000); *Luckett v. Rent-A-Center*, 53 F.3d 87 (7th Cir. 1995); *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994); *Mitchell v. Burt Vetterlein & Bushnell PC*, 197 F.3d 421 (9th Cir. 1999); *Sevants of the Paraclete v. Doe*, 204 F.3d 1005 (10th Cir. 2000); *Villano v. City of Boynton Beach*, 254 F.3d 1302 (11th Cir. 2001).

[4] *Bloom v. Illinois*, 391 U.S. 194 (1968) (holding that prosecutions for serious criminal contempt are subject to the jury trial provisions of the Constitution); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961) (holding that a civilian's exclusion from the Naval Gun Factory in Washington, D.C. without being advised of the grounds for exclusion or hearing did not violate due process); *Galvan v. Press*, 347 U.S. 522 (1954) (holding that a classification by Congress, which provided for the deportation of any alien who was a member of the Communist Party, did not violate due process); *Lambert v. California*, 355 U.S. 225 (1957) (holding that a felon in California who did not know of the duty to register with the police department may not be convicted consistently with due process); *Lynch v. United States*, 292 U.S. 571(1934) (holding that the district court did not lack jurisdiction after the enactment of the Economy Act, and that Congress did not withdraw the plaintiff's right to sue the government); *Matthew v. Eldridge*, 424 U.S. 319 (1976) (holding that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due

establish any basis for granting a writ of certiorari in this case.

B. For over Fifty Years, the Federal Rules Have Incorporated a Time Limit on the Filing of an Appeal where the District Court Clerk Fails to Notify the Parties of a Final Judgment.

Petitioner fails to acknowledge that Civil Rule 77(d) and Appellate Rule 4(a)(6) specifically work in tandem to enlarge a party's right to appeal when the clerk fails to provide notice of an entry of judgment. Before the 1991

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process); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (holding that the Fifth Amendment prohibits federal government from seizing real property in a civil forfeiture proceeding without a prior notice and hearing); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (holding that the Minimum Wages For Women Act was constitutional and did not violate the due process clause of the Fourteenth Amendment). The appellate court cases cited by the Petitioner also do not address the issue in this case. *Kaczmarczyk v. I.N.S.*, 933 F.2d 588 (7th Cir. 1991) (holding that Polish citizens who sought political asylum had a constitutional right to rebut official and/or judicial notice taken by the appellate board through motions to reopen, but their failure to file such motions waived their individual rights to rebuttal); *Knoetze v. United States*, 634 F.2d 207 (5th Cir. 1981) (holding that revocation of an alien's visa, without notice, did not jeopardize a liberty or property interest entitled to constitutional protection); *Potter v. Castle Construction Co.*, 355 F.2d 212 (5th Cir. 1966) (holding that in a National Labor Relations Act case the appellee could have interevened at any stage of the proceeding and had waived any complaint); *Propert v. District of Columbia*, 948 F.2d 1327 (D.C. Cir. 1991) (holding that a city's policy with respect to the towing and destruction of supposed "junk" vehicles that are registered or licensed violated due process).

amendments to both rules, an individual's right to appeal was viewed as lost even if the clerk's failure to provide notice of an entry of judgment or order was the sole cause of a party's untimely appeal.

Civil Rule 77(d) requires a district court clerk to notify parties of the entry of final judgment. Prior to 1946, this rule contained no provision stating what would happen to the appeal period if the clerk failed to issue notice. In an effort to fill this gap, in *Hill v. Hawes*, 320 U.S. 520 (1944), this Court held that a district court had discretionary authority to vacate a judgment and reenter it for the purpose of reviving a party's right to appeal when the clerk failed to give notice of the original judgment.

After *Hill*, in an effort to establish finality of district court judgments, Civil Rule 77(d) was amended in 1946 to provide that a clerk's failure to notify the parties of final judgment did *not* extend the appeal period or otherwise authorize a district court to vacate and reenter its judgment. [Advisory Committee Notes to the 1946 Amendment to Fed. R. Civ. Proc. 77(d).] The amendment made it clear that notification by the clerk was "merely for the convenience of litigants." [Advisory Committee Notes to the 1946 Amendment to Fed. R. Civ. Proc. 77(d).] The 1946 amendment to Civil Rule 77(d) resulted in the loss of a litigant's opportunity to appeal when the clerk failed to provide notice of the entry of judgment. *See, e.g., Wilson v. Atwood*, 725 F.2d 255 (5th Cir 1984); *Case v. BASF Wyandotte*, 737 F.2d 1034 (Fed. Cir. 1984).

In 1991, Civil Rule 77(d) and Appellate Rule 4(a) were amended to ease the sanctions imposed on litigants who were barred from filing appeals because of the

clerk's failure to provide notice of entry of judgment. [Advisory Committee Notes to the 1991 Amendment to Fed. R. Civ. Proc. 77(d) and Fed. R. App. Proc. 4(a).] Civil Rule 77(d) now states that lack of notice by the clerk does not relieve a party from filing a timely appeal *"except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure."* [Fed. R. Civ. Proc. 77(d).] Appellate Rule 4(a)(6), as amended, allows the district court to reopen the time to file an appeal only when:

> (1) *The motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of entry, whichever is earlier;*
>
> (2) The court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (3) The court finds that no party would be prejudiced.

[Fed. R. App. Proc. 4(a)(6).]

The 1991 amendment to Appellate Rule 4(a) was viewed as imposing an "outer time limit" of 180 days for a party to seek leave to file a late appeal where that party failed to receive notice of entry of judgment. [Advisory Committee Notes to the 1991 Amendment to Fed. R. App. Proc. 4(a).] The time restrictions in Appellate Rule 4(a)(6) strike a perfect balance between the duty of the clerk to give notice of entry of judgment and a party's duty to maintain contact with the court while her case is pending. [Advisory Committee Notes to the 1991 Amendment to Fed. R. Civ. Proc. 77(d) and Fed. R. App. Proc. 4(a)(6).]

The rule also serves a dual purpose in protecting the interests of obtaining final judgments and preserving a litigant's right to appeal when notice of order or judgment is not provided by the clerk. [*Id.*]

In the present case, Petitioner did not check with the district court to determine the status of the cross-motions for summary judgment. Instead, Petitioner let her 180-day opportunity to appeal pass without any action on her part until after the regulatory time period expired. Under Appellate Rule 4(a)(6), the 180-day period from the entry of judgment serves as the "outer time limit" in which a party can attempt to reopen her appeal. [Advisory Committee Notes, 1991 Amendment to Fed. R. App. Proc. 4(a)(6).]

The very rule which the Petitioner claims violates her right to due process originated with this Court. [Amendments to Federal Rules of Civil Procedure: Supreme Court of the United States, 134 F.R.D at 525-526, 697-699 (April 30, 1991); Amendments to Federal Rules of Appellate Procedure: Supreme Court of the United States, 134 F.R.D. at 725-726, 727 (April 30, 1991).] To allow Petitioner in this instance the right to file an untimely appeal not only abrogates the clear provisions of Civil Rule 77(d) and Appellate Rule 4(a)(6), but also destroys the purpose of the rules in placing a duty on the parties to stay in contact with the court while their case is pending.

C. The Fifth Amendment Of The United States Constitution Is Not Violated When A Party Loses A Procedural Right To Appeal Due To Her Own Neglect.

Petitioner claims that her right to appeal should not be forfeited under Appellate Rule 4(a)(6) when notice of the trial court's judgment was not received until after expiration of the 180-day deadline prescribed by the rule. [Petitioner's Petition for Writ of Certiorari, p. 8.] Petitioner believes that the bar of her appeal, under these facts, violates due process. The fundamental problem with Petitioner's argument is that it ignores the fact that she did not lose her right to appeal by operation of Appellate Rule 4(a)(6), but by her own failure to contact the clerk in a timely manner to determine the status of the summary judgment ruling.

A party is not denied due process when her appeal is untimely due to her own neglect. In *Wainwright v. Torna*, 455 U.S. 586 (1982), the issue was whether a criminal defense counsel's failure to seek discretionary review by a state supreme court constituted ineffective assistance of counsel. This Court held that it did not. *Id.* at 588. In a footnote, this Court also held that an untimely request for review did not constitute a due process violation:

> Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation – if even implicating a due process interest – was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application fo review that was not filed timely

> did not deprive respondent of due process of law.

Id. at 588, n. 4. Likewise, the untimeliness of the appeal in this case was caused by counsel, not by Appellate Rule 4(a)(6).

A similar result was reached in *Mitchell v. Burt Vetterlein & Bushnell PC*, 197 F.3d 421 (9th Cir. 1999), which involved a due process challenge to Appellate Rule 4(a)(6). The parties asserted that they had not received notice from the district court clerk of the entry of judgment on October 1, 1997. The parties claimed that on April 9 and 10 of the following year, they discovered orders denying their post-trial motions. The parties then filed motions to obtain relief from their failure to file their appeals in a timely fashion. The Ninth Circuit held that the plain language of both Appellate Rule 4(a)(6) and Civil Rule 77(d) specifically deal with the problem of lack of notice of a final judgment. 197 F.3d at 425. The court further held that because the language in Appellate Rule 4(a)(6) delineates a specific period during which the period of appeal may be reopened, the district courts no longer have the discretion to grant motions to reopen the period for appeal that are filed outside that specific period, *"even if the appellant does not receive notice until that period has expired."* *Id.* at 425 (emphasis added). The court further stated:

> The 180 day period 'establishes an outer time limit for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal'. . . . Taken together, Rule 77 (d) and the changes to Rule 4(a) set *an outer* limit on the time a party can wait, but is it *the outer* limit?

> The answer is yes. The very structure of the changes make it clear that parties are expected to energize themselves, and to discover the entry, with or without notice. Failing that, they lose the right to appeal.

[*Id.* (emphasis in original).]

The Ninth Circuit also rejected the appellant's argument that the federal rules somehow violate due process under the Fifth Amendment. *Id.* at 426. The court held that where a procedural right to appeal is limited in time, "the onus is upon the party to determine when that time commences to run" and that any loss of rights was due to the actions of the party and not a result of the operation of the federal rules. *Id.* at n. 11.

In summary, Petitioner had an opportunity to file her appeal to the Fifth Circuit. However, in order to establish finality of judgment, this opportunity was limited in time pursuant to Appellate Rule 4(a)(6) and Civil Rule 77(d). The loss of the Petitioner's right to appeal was due to her own inaction in failing to determine the appropriate time in which to seek the protection of Appellate Rule 4(a)(6) and was not due to the federal rules.

CONCLUSION

For the foregoing reasons, Petitioner has failed to satisfy any ground for a writ of certiorari and the petition should therefore be denied.

Respectfully submitted,

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APPENDIX

Fed. R. Civ. Proc. 77(d)

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

ADVISORY COMMITTEE NOTES

1946 Amendment

Note. Rule 77(d) has been amended to avoid such situations as the one arising in *Hill v. Hawes*, 1944, 64 S.Ct. 334, 320 U.S. 520, 88 L.Ed. 283. In that case, an action instituted in the District Court for the District of Columbia, the clerk failed to give notice of the entry of a judgement for defendant as required by Rule 77(d). The time for taking an appeal then was 20 days under Rule 10 of the Court of Appeals (later enlarged by amendment to thirty days), and due to lack of notice of the entry of judgment the plaintiff failed to file his notice of appeal within the prescribed time. On this basis the trial court vacated the original judgment and then re-entered it, whereupon

notice of appeal was filed. The Court of Appeals dismissed the appeal as taken too late. The Supreme Court, however, held that although Rule 77(d) did not purport to attach any consequences to the clerk's failure to give notice as specified, the terms of the rule were such that the appellant was entitled to rely on it, and the trial court in such a case, in the exercise of a sound discretion, could vacate the former judgment and enter a new one, so that the appeal would be within the allowed time.

Because of Rule 6(c), which abolished the old rule that the expiration of the term ends a court's power over its judgment, the effect of the decision in *Hill v. Hawes* is to give the district court power, in its discretion and without the limit, and long after the term may have expired, to vacate a judgment and reenter it for the purpose of reviving the right of appeal. This seriously affects the finality of judgments. See also proposed Rule 6(c) and Note; proposed Rule 60(b) and Note; and proposed Rule 73(a) and Note.

Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for

appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment. Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under Rule 73(a), for the extension of the time for appeal.

1991 Amendment

This revision is a companion to the concurrent amendment to Rule 4 of the Federal Rules of Appellate Procedure. The purpose of the revisions is to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment. [Citations omitted.]

Failure to receive notice may have increased in frequency with the growth in the caseload in the clerk's offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court as well as counsel.

The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice. An appropriate procedure for such notice is provided in Rule 5.

The revised rule lightens the responsibility but not the workload of the clerk's offices, for the duty of that office to give notice of entry of judgment must be maintained.

Fed. R. App. Proc. 4(a)(6)

(a) Appeal in a Civil Case

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

ADVISORY COMMITTEE NOTES

1991 Amendment

The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. By "prejudiced" the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

Reopening may be ordered only upon a motion filed within 180 days of the entry of judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal and enable any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment, as authorized by Fed.R.Civ.P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a

judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the district court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.